No. 92-1639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,

Petitioners,

VS.

ENVIRONMENTAL DEFENSE FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE COUNTY OF WESTCHESTER, NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE

Amicus is the County of Westchester and its taxpayers residing in

Westchester County Refuse District No. 1* which have a direct interest in the outcome of this Court's ruling on the issue of whether ash residue generated by resource recovery facilities such as the County of Westchester's Charles Point Resource Recovery Facility in Peekskill, New York is subject to regulation as a hazardous waste under Section 3001(i) of the Resource

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*The Westchester County Refuse District No. 1 was established pursuant to New York County Law Article 5-A and formed in 1982 by Resolution No. 227-1981 of the Westchester County Board of Legislators and approved by the voters at a referendum (see Matter of Crell v. O'Rourke, 88 A.D.2d 83 (2d Dep't 1982) aff'd, 57 N.Y.2d 702 (1982). The District was established as a means of financing the operating costs of a resource recovery facility in the County. The District also owns and operates an ashfill known as the Sprout Brook Residue Disposal Site located in Cortlandt, New York where the Charles Point facility's ash is brought for disposal.

Conservation and Recovery Act (RCRA), 42 U.S.C. §6921(i). See Appendix, infra, for text of statute.

The Charles Point Resource Recovery Facility*, the construction of which was authorized by Resolution No. 28-1979 of the Westchester County Board of Legislators and financed by approximately $200 million dollars in bonds issued for the facility's construction, was the very resource recovery facility at issue in Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc., 725 F.Supp 758 (S.D.N.Y. 1989) aff'd, 725 F.2d 758 (2d. Cir. 1991) cert den, 112

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*The Charles Point Resource Recovery Facility is currently operated by Westchester Resco, L.P., which is a subsidiary of Wheelabrator Technologies, Inc. Resco designed the facility pursuant to a 1981 agreement entered into by the County of Westchester and Wheelabrator-Frye, Inc. a predecessor of Wheelabrator Technologies, Inc.

S.Ct. 453 (1991). In that case, the United States Court of Appeals for the Second Circuit unanimously rejected the identical contention at bar brought by the very party before this Court, the Environmental Defense Fund, Inc. and ruled that incinerator ash is exempt from regulation under Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901-6992k.

The County of Westchester urges that this Court reverse the United States Court of Appeals for the Seventh Circuit's overly narrow and strained majority ruling in City of Chicago, et al. v. Environmental Defense Fund, Inc. and adopt the position and reasoning articulated by the Second Circuit and by the United States Environmental Protection Agency (EPA) that incinerator ash is exempt from regulation under

Subtitle C of RCRA.

An adverse decision by this Court finding that ash from the thermal reduction of solid waste is subject to regulation as a hazardous waste under Subtitle C of RCRA would have significant financial consequences for taxpayers residing within Westchester County Refuse District No. 1, as well as for presently over 128 other operating resource recovery facilities, four facilities under construction and an estimated 42 facilities in planning throughout the United States. See Solid Waste and Power, Energy-from-Waste 1988 Activity Report i (1993).

SUMMARY OF ARGUMENT

The decision of the majority of the United States Court of Appeals for the Seventh Circuit in City of Chicago, et al. v. Environmental Defense Fund, Inc. declaring ash remaining after the incineration of municipal solid waste at a resource recovery facility as subject to hazardous waste regulation under Subtitle C of RCRA is clearly wrong. In so ruling, the Seventh Circuit's opinion misconstrues the plain language of Section 3001(i) of RCRA, ignores the law's legislative history, purpose and intent and cavalierly casts aside any deference to the EPA's interpretations concerning this issue in disregard of this Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Indeed, the Seventh Circuit's strained

construction of the "plain language" of Section 3001(i) patently countermands, in toto, the policy considerations of Congress to encourage the development of resource recovery facilities as a major means of addressing this nation's mounting solid waste disposal crisis. In essence, an affirmance of the Seventh Circuit's decision by this Court will pose a tremendous economic burden upon municipalities who already face serious fiscal problems.

ARGUMENT

THIS COURT SHOULD REJECT THE ERRONEOUS DECISION OF THE SEVENTH CIRCUIT AT BAR AND ADOPT THE SECOND CIRCUIT'S RATIONALE IN WHEELABRATOR AND EPA INTERPRETATIONS CONCLUDING THAT SECTION 3001(i) OF RCRA EXEMPTED ASH REMAINING AFTER INCINERATION OR THERMAL TREATMENT OF MUNICIPAL SOLID WASTE AT A RESOURCE RECOVERY FACILITY FROM REGULATION AS A HAZARDOUS WASTE

A. Plain Language of Section 3001(i) of RCRA Belies the Seventh Circuit's Statutory Construction

The majority of the Seventh Circuit's holding in City of Chicago v Environmental Defense Fund that the "plain language" of Section 3001(i) of RCRA subjects the ash remaining from the burning of municipal waste to Subtitle C regulation is "plainly" wrong. The Court's narrow and sole reliance on the

absence of the word "generation" in Section 3001(i) to support its position ignores the general broad scope of Section 3001(i) which exempts the activities of a resource recovery facility from all hazardous waste regulation - those governing "treating, storing, disposing of or otherwise managing" waste. Subtitle C of RCRA as a whole is even captioned "HAZARDOUS WASTE MANAGEMENT". The statutory definition of hazardous waste "management" contained in 42 U.S.C. §6903(7) includes "all storage, transportation, processing, treatment, recovery and disposal of hazardous wastes." (emphasis added). The term "treatment" is further defined, in pertinent part, as any method, technique, or process... designed...so as to render such waste...reduced in volume." 42 U.S.C. §6903(34).

A plain reading of these terms clear-

ly encompasses producing and then handling and disposing of ash. The majority of the Seventh Circuit's statutory construction of these terms to the contrary runs counter to the plain meaning of Section 3001(i) which indicates that resource recovery facilities are exempt from the requirements of Subtitle C because they do not treat or "manag[e] hazardous wastes."

B. **The Legislative History, Purpose and Intent of Section 3001(i) of RCRA Clearly Support the Second Circuit's Opinion in Wheelabrator**

Even assuming, arguendo, Section 3001(i) were ambiguous, the majority of the Seventh Circuit's decision at bar is still erroneous. As a unanimous Second Circuit correctly declared in Environmental Defense Fund, Inc. v Wheelabrator Technologies, Inc., 725 F. Supp. 758 (S.D.N.Y. 1989) aff'd., 931 F.2d 211 (2d Cir. 1991) cert den. 125 Ct

453 (1991), the legislative history of the 1984 clarification of the EPA's 1980 regulatory household waste provision (45 Fed. Reg. 33,120 (May 19, 1980) codified as amended at 40 C.F.R. §261.4(b)(1) (1987)) makes crystal clear Congress' intent to exclude ash generated by an excluded facility from regulation under Subtitle C of RCRA. In so ruling, the Wheelabrator Courts looked to the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation and commented on Section 3001(i) and stated in, pertinent part:

> New section 3001(d)[sic] to section 3001 clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources. All waste management activities of such a facility,

> including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion...

S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). See also, Wheelabrator, 725 F. Supp at 765.

Furthermore, Section 3001(i) is a clarification of the EPA's Household Waste Exclusion, "a previously existing regulatory exclusion which clearly extended to ash". Wheelabrator, 725 F.Supp at 765.

As Judge Haight, United States District Court Judge for the Southern District of New York, aptly observed in Wheelabrator:

> Nowhere in the 1984 exclusion, nor in the Committee report which accompanied it, is there any hint of a congressional intent to limit the scope of

> that earlier exclusion. EDF argues that the ash resulting from the incineration of household waste remains exempt from regulation under Subtitle C, pursuant to the 1980 exclusion, but that ash generated by a facility that accepts municipal as well as household waste is not so exempt. I do not think that a fair reading of the statute. More important, neither, according to its declarations, would Congress.
>
> Congress clearly knew of the EPA's interpretation of the 1980 regulation and had it disagreed, would have made clear its disagreement. See Young v Community Nutrition Institute, 476 U.S. 974, 983, 106 S. Ct. 2360,2365, 90 L. Ed. 2d 959 (1986) (quoting NLRB v. Bell Aerospace, Co., 416 U.S. 267,275, 94 S. Ct. 1757,1762, 40 L. Ed. 2d 134 (1974)) ('congressional failure to revise or repeal the agency's interpretation is the one intended by Congress'). Instead Congress clarified its 'original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources'. Senate Report at 61.

Wheelabrator, 725 F. Supp at 765-66.

Clearly, Congress' interest and purpose in enacting Section 3001(i) was to encourage energy recovery. The legislative history brings to light that at the time of its passage, Congress intended Section 3001(i) to exempt ash from reglation under Subtitle C in order "to pave the way for increased use of the resource recovery process". See Wheelabrator, 725 F. Supp at 770.

If the majority of the Seventh Circuit's view is adopted by this Court that Section 3001(i) subjects the ash remaining from the burning of municipal waste to Subtitle C regulation, Section 3001(i) essentially provides no regulatory relief for resource recovery facilities because it fails to exempt such facilities from one of the most burdensome regulatory restrictions. See, Wheelabrator, 725 F. Supp. at 763 n. 12

(if ash is not exempt from regulation as a hazardous waste, "it is difficult to understand what, if any, benefit the Facility derives from the exemption.") Clearly, the majority of the Seventh Circuit's decision at bar, undermines the primary purpose of Section 3001(i) and accordingly should be rejected by this Court.

C. EPA'S Interpretation Should Be Accorded Deference by this Court

On September 18, 1992, the Administrator of the EPA issued a memorandum clearly articulating the EPA's determination that under Section 3001(i) of RCRA, the ash generated from the combustion of municipal solid waste at resource recovery facilities should be treated as exempt from hazardous waste regulation under Subtitle C of RCRA. (See Appendix to Petitioner's Petition for a Writ of Certiorari at pp. 41a-49a).

After this Court remanded the Seventh Circuit's judgment affording that Court the opportunity for reconsideration in light of the EPA's determination, the same majority of the Seventh Circuit by an opinion dated January 29, 1993 (See, Appendix to Petitioners' Petition for a Writ of Certiorari at p. 1a-4a) patently refused to defer to the reasonable interpretation of Section 3001(i) reached by the EPA, the very agency charged with the administration of RCRA.

It is submitted that such view boldly disregarded this Court's holding in Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) to defer to the reasonable interpretation of the agency charged with the administration of the statute. As Seventh Circuit Judge Ripple cogently noted in his dissenting opinion, notwithstanding the varying interpretations

given Section 3001(i) of RCRA by the EPA in the past, this Court emphasized in Chevron, 467 U.S. at 863, that "[a]n initial agency interpretation is not instantly carved in stone" and that an "agency has the continuing obligation to ensure that its interpretation is reasonable by considering varying interpretations and the wisdom of its policy on a continuing basis" Chevron,467 U.S. at 863-64. (See Appendix to Petitioner's Petition for a Writ of Certiorari at pp. 3a-4a). Furthermore, revised agency interpretations should also be accorded deference. Rust v Sullivan, 111 S. Ct. 1759, 1769 (1991).

D. Policy Considerations Support Finding by this Court for Exemption of Ash as Hazardous Waste Under Subtitle C of RCRA

Finally, an affirmance by this Court of the strained and overly narrow construction of the "plain language" of

Section 3001(i) of the RCRA by the majority of Seventh Circuit, undermines the development and use of resource recovery facilities which clearly is at odds with Congress' intention to encourage "commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284 at 61. Indeed, Congress' election reflected in Section 3001(i) to exclude the waste management activities of resource recovery facilities from hazardous waste regulations under Subtitle C was intended to promote resource recovery as one of the major solutions to this nation's emerging solid waste disposal crisis.

If the Seventh Circuit's statutory construction of Section 3001(i) is affirmed by this Court, the implications

are severe. Such a ruling could significantly deter the development of additional resource recovery facilities and cause tremendous economic hardships upon municipalities and their taxpayers who presently rely upon such facilities, by dramatically escalating operating costs. Recent EPA data demonstrate that the cost of disposal in a hazardous waste (Subtitle C) landfill is ten times the cost of disposal of a non-hazardous waste (Subtitle D) landfill. See EPA Memorandum dated September 18, 1992 from William Reilly at pp. 48a-49a as set forth in the Appendix to Petitioners' Petition for Writ of Certiorari.

Aside from the serious financial costs of managing ash as hazardous waste, hundreds of communities will encounter troublesome enforcement consequences as well. The Seventh Circuit's decision, if affirmed, will be a monumental setback and will undermine

carefully designed solid waste management plans for municipalities throughout the United States, including the County of Westchester, that have turned to resource recovery as an environmentally sound method for municipal solid waste management.

CONCLUSION

For the foregoing reasons, the County of Westchester, New York as amicus respectfully requests this Court adopt the position and reasoning of the United States Court of Appeals for the Second Circuit espoused in Wheelabrator and by the United States EPA and rule that ash is exempt from hazardous waste regulation under Subtitle C of RCRA and reverse the decision of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. §6921(i).

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if–

(1) such facility–

(A) receives and burns only–

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.